No. 95-442

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

U.S. HEALTHCARE, INC.,

Petitioner,

v.

CECILIA DUKES, Trustee Ad Litem of the Estate of Darryl Dukes, Deceased,

Respondent.

U.S. HEALTHCARE, a/k/a THE HEALTH MAINTENANCE ORGANIZATION OF PENNSYLVANIA/NJ,

Petitioner,

v.

SERENA MARY VISCONTI, DECEASED, BY LINDA AND RONALD VISCONTI, AS ADMINISTRATORS OF THE ESTATE OF SERENA MARY VISCONTI, DECEASED; LINDA VISCONTI; RONALD VISCONTI, IN THEIR OWN RIGHT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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Respondent Cecilia Dukes, Trustee *Ad Litem* of the Estate of Darryl Dukes, Deceased, hereby respectfully prays this Honorable Court deny Petitioner's prayer for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals entered in these consolidated appeals on June 19, 1995. Respondent asserts that removal of these actions from state court was improper, and that the Third Circuit correctly remanded the actions to state court.

STATEMENT OF THE CASE

Respondent Cecilia Dukes brought an action in state court on behalf of the Estate of Darryl Dukes, alleging that the negligence and malpractice of various medical providers led to the death of Darryl Dukes. It was further alleged that these providers were all the ostensible agents of U.S. Healthcare, the HMO through which Mr. Dukes received his care, and that U.S. Healthcare was liable to the estate for direct negligence and pursuant to state law agency theories (whereunder an HMO may be liable for malpractice committed by providers who are its "employees"). See *Boyd v. Albert Einstein Medical Center*, 377 Pa. Super Ct. 609, 547 A.2d 1229, 1234-35 (1988).

U.S. Healthcare removed the case to the United States District Court for the Eastern District, claiming that the Dukes' claims against it are preempted by ERISA, and further moved to dismiss the claims against it upon that preemption. The District Court dismissed the claims against U.S. Healthcare and remanded the remaining claims against the providers to the state court. On appeal,

the Third Circuit reversed, and held that the claims against U.S. Healthcare were not completely preempted by ERISA, and remanded the entire action to state court.

SUMMARY OF ARGUMENT

The claims brought by the Dukes against U.S. Healthcare are not completely preempted by ERISA. Accordingly, the entire case was properly remanded by the Third Circuit to state court.

ARGUMENT

"Removal and preemption are two distinct concepts." *Warner v. Ford Motor Co.*, 46 F.3d 531, 535 (6th Cir. 1995). The only matter properly before this court is whether removal by U.S. Healthcare was proper. In order to make this determination, one looks first to § 514(a) of ERISA, 29 U.S.C. § 1144(a), which states that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." U.S. Healthcare cites this statute in support of its contention that because Mr. Dukes received his healthcare benefits through an HMO, which has a remote connection to an ERISA plan, the claims against the HMO "arise under" federal law, giving the federal courts original jurisdiction, creating the grounds for removal.

However, removal is not so simple. It is well-settled that a cause of action arises under federal law *only* when plaintiff's well-pleaded complaint raises issues of federal

law. *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). This doctrine, known as the well-pleaded complaint rule, is "the basic principle marking the boundaries of the federal question jurisdiction of the federal district court." *Franchise Tax Bd. of Cal. v. Construction Laborers' Vacation Trust for Southern Cal.*, 463 U.S. 1 (1983).

Plaintiff's complaint herein does not raise issues of federal law. Rather, negligence, malpractice and agency theories are asserted, all state law theories. Preemption was raised by U.S. Healthcare as a defense, and "the fact that a defendant might ultimately prove that a plaintiff's claims are preempted . . . does not prove that they are removable to federal court." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398 (1987).

The Supreme Court in *Metropolitan Life* recognized an exception to the well-pleaded complaint rule, under which "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life*, 481 U.S. at 63-64. This exception, known as "complete preemption", applies only when "the preemptive force of the (statute in question) is so powerful as to displace entirely any state cause of action. . . . " *Franchise Tax Bd.*, 463 U.S. at 23.

ERISA's preemptive force, while broad, is clearly not so powerful. There are numerous types of claims which are remotely related to ERISA but not preempted thereby. " . . . [R]un-of-the-mill state law claims, such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan – are all relatively common" and not preempted. *Mackey v. Lanier Collection Agency & Service*,

Inc., 486 U.S. 825, 833 (1988); *see also Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990).

In order to decide what claims are completely preempted under ERISA and what claims are not, the Court's analysis of the claims in *Metropolitan Life* can be followed. Therein, an employee who had been ill was examined by employer's physician, who pronounced him recovered. Employee's benefits were thereby terminated, and when employee refused to return to work, he was fired. Employee filed an action in state court to enforce the payment of benefits to him; employer removed the action to federal court, and ultimately the Supreme Court found that because employee's claims fell directly under §502(a)(1)(b) of ERISA – specifically, to recover benefits and rights, both past and future, due him under a plan – the claims were completely preempted.

The Supreme Court found that §502(a)(1)(b) "lies at the heart of a statute with the unique preemptive force of ERISA", 481 U.S. at 66. Claims under §502 are necessarily completely preempted. The court's rationale was that "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of §502(a) removable to federal court." 481 U.S. at 66.

However, the Supreme Court cautioned that it would be "reluctant to find that extraordinary preemptive power . . . that converts an ordinary state common law complaint into one stating a federal claim for the purpose of the well-pleaded complaint rule." 481 U.S. at 66.

The Dukes' claims are ordinary state law claims which sound in negligence, malpractice and agency theories. The preemptive powers of ERISA are not so sweeping as to preempt such claims, under *Metropolitan Life.* The claims of the Dukes fall outside the scope of the enforcement provisions of §502. While ultimately the state could decide those claims are preempted, they are not completely preempted, under *Metropolitan Life,* and were properly remanded.

It is not correct for U.S. Healthcare to assert that there are conflicts in the circuits as to the scope of removal jurisdiction. U.S. Healthcare first cites several circuit court opinions holding, like the Third Circuit below, *see Dukes v. U.S. Healthcare, Inc.,* 848 F. Supp. 39 (E.D. Pa. 1994), *rev'd.,* 57 F.3d 350 (3d Cir. 1995), that claims which may ultimately be preempted are not removable unless they fall under the civil enforcement provisions of §502. *See Alexander v. Electronic Data Systems Corp.,* 13 F.3d 940 (6th Cir. 1994); *Zuniga v. Blue Cross and Blue Shield of Michigan,* 52 F.3d 1359, 1398 (6th Cir. 1995); *Warner v. Ford Motor Co.,* 46 F.3d 531, 534 (6th Cir. 1995); *WPO v. Human Affairs International, Inc.,* 28 F.3d 269, 272 (2d Cir. 1994).

Then, U.S. Healthcare cites a variety of cases from the various circuits, and claims that these cases are in conflict with *Dukes.* Contrary to U.S. Healthcare's assertions, the various cases are *not* in conflict and are all distinguishable from Dukes in the most important way: they each concern a denial of benefits by the entity in question, and are *clearly* claims that fall squarely under §502. They are thus distinguishable from the Dukes' claims in the very way the Third Circuit in *Dukes* explained. The Dukes'

claim falls *outside* the scope of §502(a)(1)(b), while the claims of the plaintiffs in the cases cited by defendant all fall directly under and pursuant to §502(a)(1)(B).

Specifically, *Hubbard v. Blue Cross & Blue Shield Assoc.*, 42 F.3d 942 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2276 (1995), cited by defendant, is distinguishable. Therein, a participant was diagnosed with cancer, and had certain medical treatments recommended to her for which her health insurer refused to pay. She sued on two grounds, alleging first that the carrier had secret, undisclosed guidelines which it followed when making benefits determinations, and, second, that she had been fraudulently induced by the insurer's advertisements to become a participant. The Fifth Circuit determined, with regard to the first claim, that "the essence of the Hubbard's claim is that her benefits under the plan were improperly denied." Interestingly, the Fifth Circuit found that the second claim, fraudulent inducement, was *not* preempted by ERISA, because that claim "does not implicate the plan's administration of benefits or affect the relations among the principal ERISA entities." 42 F.3d at 947. This holding is entirely consistent with *Dukes*; in fact, it demonstrates the correctness of the *Dukes* holding, in light of *Metropolitan Life*, in distinguishing claims for benefits under §502, which are completely preempted, and claims which do not fall under 502(a) and do not implicate the plan's administration of benefits or affect relations among principal ERISA entities, which are *not* completely preempted.

The other cases cited by defendant are all distinguishable from *Dukes* and are not in conflict in any way, because, in each, plaintiff sought to recover or enforce

some right or benefit due under a plan. In *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444 (6th Cir. 1992), the plaintiff was a truck driver who worked for a variety of affiliated companies and sought to recover retirement benefits. The issue was, what periods of time had he worked for which company, as it affected the benefits available. But, clearly, an action by a participant to clarify benefits due falls squarely under §502. In *Shiffler v. Equitable Life Assurance Society of U.S.*, 838 F.2d 444 (6th Cir. 1992), a widow sued for accidental death benefits which were denied by husband's employer. The Court said: "no matter how her action is characterized, her goal is to recover the proceeds claimed under the policies." 838 F.2d at 81. No similar goal is sought by the Dukes.

In *Olson v. General Dynamics Corp.*, 960 F.2d 1418 (9th Cir.), *cert. denied*, 504 U.S. 986 (1992), plaintiff employee went from one company to another as the result of a corporate buy-out. His boss assured him he would have no change at all in benefits due; however, he alleged that his retirement benefits had been reduced as a result of the buy-out. He sued upon the promise by his employer, alleging that he had been fraudulently induced to go along with the new company. After a lengthy analysis, the court determined that Mr. Olson could have brought his action under §502(a)(1)(B), and that it was accordingly completely preempted.

Finally, in *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2456 (1993), plaintiff was injured in an auto accident and treated with his primary care physician under his HMO. Although the primary care physician did not refer him,

he also sought treatment with a specialist, then sued to recover money paid for the specialist. Clearly, as the court found, the civil enforcement provisions of §502 preempt this type of claim.

Nor is it correct, as U.S. Healthcare asserts, that the decision by the Third Circuit in *Dukes* conflicts with the decision of the Fifth Circuit in *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 812 (1992). In *Corcoran*, there was a denial of benefits; in *Dukes*, there was not. That distinction is precisely the one drawn by the Third Circuit in its opinion below. Because the claims in *Corcoran* arose from the denial of a benefit, those claims arose pursuant to §502. As such, they are completely preempted. No other preemption discussion should be heard before this Court, because the case herein was properly remanded to the state court. The distinction drawn by the *Corcoran* court, explained in the *Dukes* decision below, is precisely the distinction drawn by the Supreme Court in *Metropolitan Life*. Corcoran's claims fell under §502 and were thus intended by Congress to be completely pre-empted; in all other cases, the Court has been and should continue to be "reluctant" to find that ordinary state law claims, like the Dukes', which fall outside the scope of §502(a), are preempted.

In fact, contrary to U.S. Healthcare's assertions, numerous courts of various circuits are in agreement with the Third Circuit and have followed *Allstate Insurance Co. v. 65 Sec. Plan*, 879 F.2d 90 (3d Cir. 1989), wherein a 2-prong test for complete preemption was laid out, as follows:

> The doctrine of complete preemption applies only when two circumstances are present: when the enforcement provisions of a federal statute create a federal cause of action vindicating the same interest that the plaintiff's cause of action seeks to vindicate[,] and when there is affirmative evidence of a congressional intent to permit removal despite the plaintiff's exclusive reliance on state law. 879 F.2d at 93.

See Bryant v. Blue Cross and Blue Shield of Alabama, 751 F.Supp. 968, 972 (11th Cir. 1990); *Barker v. Pick n' Pull Auto Dismantlers*, 819 F. Supp. 889 (E.D. Cal. 1993); *Medical College of Wisconsin Faculty Physicians & Surgeons v. Pitsch*, 776 F. Supp. 437, 439 (E.D. Wis. 1991).

In *Allstate*, the Third Circuit relied upon *Railway Labor Executives Ass'n. v. Pittsburgh & Lake Erie Railroad Co.*, 858 F.2d 936 (3d Cir. 1988), which in turn relied upon two Supreme Court decisions, for the development of the two-prong test:

> There is a very limited area in which a federal court in a case removed from a state court is authorized to recharacterize what purports to be a state law claim as a claim arising under a federal statute. In order to determine whether it possesses this authority to recharacterize, the federal court must first ask whether the statute relied upon by the defendant . . . contains civil enforcement provisions within the scope of which the plaintiff's state claim falls. *Railway Labor*, 858 F.2d at 942, *citing Franchise Tax Bd.*, 463 U.S. at 24, 26.

The *Railway Labor* court went on to quote *Avco Corporation v. Aero Lodge No. 735, Int'l. Assoc. of Machinists and Aerospace Workers*, 390 U.S. 557, 562, *rehearing denied*, 391

U.S. 929 (1968), as follows: "the issue is not whether the federal law provides the same remedy available to the plaintiff under state law, but rather whether there is some vindication for the same interest." See *Railway Labor*, 858 F.2d at 942, footnote 2, *citing Avco*, 390 U.S. at 562.

CONCLUSION

Because the Dukes' claims fall outside the scope of §502(a), they were not intended by Congress to be completely preempted by ERISA. Because they are not completely preempted, the claims should not have been removed to federal court in the first place, and were properly remanded by the Court below.

Respectfully submitted,

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